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2002 NOV 13 AM 9:25
PATENT TRIAL AND APPEAL BOARD

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Prairie Island Indian Community, a federally recognized Indian Tribe,	Reg. Nos. 1,949,380; 1955,279 2,010,396; 2,176,004; 1,984,421 2,040,221; 2,019,481; 1,918,033 1,941,475; 1,966,090; 1,903,619 1,943,123; 1,949,379; 1,985,968 2,040,756; 2,040,770; 1,981,369
Petitioner	
vs.	
Treasure Island Corporation,	Can.Nos. 28,126; 28,127; 28,130 28,133; 28,145; 28,155; 28,199 28,248; 28,280; 28,294; 28,314 28,319; 28,325; 28,342; 28,379 28,171; 28,174
Registrant.	

LETTER

November 4, 2002

Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Dear Trademark Trial and Appeal Board:

Enclosed herewith for filing are the following documents:

1. The original and two copies of the Petitioner's Response to Motion to Compel Production of Documents, to Define Scope of the Waiver of Attorney Client Privilege and to Extend Discovery;

2. Certificate of Service on Treasure Island Corporation/Michael J. McCue; and

3. Express Mail Certificate Under No. ET033373858US.

Please feel free to contact the undersigned with any questions regarding this filing, and thank you for your kind assistance.

Respectfully submitted,

JACOBSON, BUFFALO, SCHOESSLER & MAGNUSON, LTD.

Date: 11/4/02

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Attorney Docket No. 1999-0254
Express Mail No. EL835928398US

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ORIGINAL

Prairie Island Indian Community, a federally recognized Indian Tribe, Petitioner, vs. Treasure Island Corporation, Respondent.	Reg. Nos. 1,949,380; 1,955,279; 2,010,396; 2,176,004; 1,984,421; 2,040,221; 2,019,481; 1,918,033; 1,941,475; 1,966,090; 1,903,619; 1,943,123; 1,949,379; 1,985,968; 2,040,756; 2,040,770; 1,981,369 Can.Nos. 28,126; 28,127; 28,130; 28,133; 28,145; 28,155; 28,199; 28,248; 28,280; 28,294; 28,314; 28,319; 28,325; 28,342; 28,379; 28,171; 28,174

PETITIONERS MEMORANDUM IN RESPONSE TO REGISTRANT'S MOTION (1) TO DETERMINE THE SUFFICIENCY OF RESPONSES TO REQUEST FOR ADMISSIONS; (2) TO COMPEL SUPPLEMENTAL RESPONSES TO INTERROGATORIES; AND (3) FOR PRODUCTION OF DOCUMENTS

I. INTRODUCTION

This Memorandum responds to Registrant's Motion (1) to Determine the Sufficiency of Responses to Request for Admissions; (2) To Compel Supplemental Responses to Interrogatories; and (3) For Production of Documents (hereinafter Registrant's moving papers shall be referred to as "Registrant's Motion"). For all the reasons discussed herein, Registrant's Motion should be denied in its entirety.

II. DISCUSSION

Each of the discovery items at issue in TIC's Motion is discussed individually below, in the same order set forth in TIC's Motion.

Request for Admission No. 5

This Request for Admission states as follows:

> Admit that at the time You began using the "Treasure Island" mark, alone or with other words, a third party owned a federal trademark registration for "Treasure Island Hotel & Casino St. Maarten, N.A." (with "hotel & casino" and "St. Maarten, N.A." disclaimed) for casino services.

In response to this request, The Community objected based upon the fact that no time period was set forth in the request. Further, as the parties attempted to reach a resolution concerning this discovery item, The Community explained to TIC that it had no idea whether or not such a Federal Registration was owned by a third party at the time The Community started using its TREASURE ISLAND mark. There is no entity which owns any word marks designated TREASURE ISLAND HOTEL & CASINO ST. MAARTEN, NA.

Also, The Community indicated to TIC that if it was referring to U.S. Reg. No. 1,469,460, on a stylized design, The Community would be willing to admit the mark was

registered on December 15, 1987, and that it was wholly unaware of whether the mark was "owned" by anyone, '460 Registrant or otherwise, at the time The Community began using the mark. See Exhibit F to McCue Declaration attached to Registrant's Motion.

The Community remains willing to amend the response as proposed in the communication cited above. Such an amendment will be proffered at once. Given this fact, this portion of Registrant's Motion is rendered moot.

Request for Admission No. 6

This Request for Admission states as follows:

> Admit that "Treasure Island" N.V.'s 1987 registration for "Treasure Island Hotel and Casino St. Maarten N.A." was one of the reasons you did not seek registration of the word mark ""TREASURE ISLAND"" for casino services until October 1997.

Response: Deny. See answer to Interrogatory No. 6(b).

This Request for Admission was denied based upon the fact that it is based upon the premise that the community "did not seek registration" of its TREASURE ISLAND mark until October 1997. In fact, state registrations were successfully sought on the TREASURE ISLAND mark during the years 1992 and 1993, long before the October 1997 date at issue in the Request. Interrogatory 6(b), cited in Prairie Island's Response, states as follows:

> The Community sought registration of the word mark TREASURE ISLAND in 1992 with the state of Minnesota and in 1993 with the state of Wisconsin, and the marks including the word TREASURE ISLAND in Minnesota, Wisconsin, North Dakota, South Dakota, Iowa and Illinois in 1993.

TIC, completely without support, wrongly asserts that at the time the Request was responded to The Community knew "that this request refers to Prairie Island's failure to seek Federal Registration of "TREASURE ISLAND"" and that "the Request is nonsensical if construed to refer to state trademark registrations". Contrary to these unsupported statements, The Community simply responded to the Request proffered. *Nothing* in Request for Admission No. 6 refers to Federal Registrations. Rather, the Request simply refers to "seek(ing)" registration of the word mark "Treasure Island". Given the plain meaning of the proffered Request for Admission, The Community lodged a legitimate denial for the simple reason that it did, in fact, successfully seek registration of the mark before 1997.

As for The Community's supposed "lack of good faith in responding to the request . . . after TIC explained it to Prairie Island how Request No. 6 necessarily refers to federal trademark registration" (TIC's memorandum at 7), the Community is not required to amend responses based upon

after the fact explanations offered by a party which are meant to change the direction of the Request.

Request for Admission No. 7

This Request for Admission states as follows:

> Admit that Your use of "Treasure Island" for casino services infringed the "Treasure Island Hotel and Casino St. Maarten, N.A." marked for casino services."

Response: Deny. See answer to Interrogatory No. 9.

The Community legitimately denied this Request for Admission. The St. Maarten concern *never* lodged any claim of infringement against The Community, and there was no determination that The Community's use of the mark TREASURE ISLAND infringed on the cited mark. The St. Maarten entity perceived no infringement issues based upon the simple fact that no such claim of infringement was ever lodged. The Community is not required to speculate with regard to whether or not the mark was ever "infringed". Further, the Request apparently involves a word mark owned by a concern located in St. Maarten. The Community is completely unaware of what marketing channels the St. Maarten concern may have used in promoting the word mark, or whether or not the St. Maarten concern ever even used the mark as a simple word mark.

This Request, in effect, would require The Community to hypothetically presume that for some reason the St. Maarten entity would have lodged a claim of infringement against The Community and, that all entire post-claim of infringement possibilities could be fully analyzed by The Community. This would not only be unreasonable, but given the request, impossible. What would the claim be based on? Which infringement analysis is to be employed? St. Maarten's? If it's the du Pont analysis, such unknowns as the "similarity or dissimilarity of the marks in their entireties", the "similarity or dissimilarity of the nature of the goods or services", the "similarity or dissimilarity of established, likely-to-continue trade channels", the "sophistication of the St. Maarten service users", the "fame of the prior mark", and so on would need to be fully analyzed. Simply stated, this information is completely unavailable, was never provided to the Community at any time whatsoever by the St. Maarten concern, and certainly was not provided to The Community by TIC.

The denial is proper as is the response to the Interrogatory which indicated that the requested analysis was vague and ambiguous in nature, and required sheer speculation on the part of The Community, which speculation would supposedly lead to some sort of hypothetical legal

conclusion. Again, The Community was never accused of infringing the mark, and The Community does not believe it ever did infringe the mark. The denial was proper, as was the response to the Interrogatory correlating to it. This Interrogatory will be discussed in more detail later in this paper.

For all the above reasons, this portion of TIC's Motion must be denied.

Request for Admission No. 13

This Request for Admission states as follows:

> Admit that, in 1992, You first learned of Registrant's plans to use a trademark containing the words "Treasure Island", only or with other words, for its hotel and casino.

The Community's response to this Request is completely proper. Throughout this litigation TIC has consistently attempted to distinguish and narrowly define all of the goods and services at issue in this matter. The Request uses the word "trademark". This term is not defined, and The Community is not required to assume that goods (items subject to a trademark) or services (items subject to a service mark) are at issue.

Irrespective of the denial, in response to Interrogatory No. 6(e), The Community admits that previous

discovery responses and sworn deposition testimony has established that in 1992 "it first became aware that there was a casino facility under construction on the Las Vegas Strip that was to be named 'Treasure Island'". The Request for Admission is objectionable, the Interrogatory response details not only the basis for denial but, in addition, the fact that The Community first became aware that there was a casino facility under construction in Las Vegas to be named "Treasure Island" in 1992. The legitimate basis for the objection as well as the circumstances surrounding The Community's first knowledge of the construction of the facility is substantively addressed in the correlating Interrogatory response. The request has been legitimately denied, and the basis for the denial has been substantively set forth. As such, TIC's Motion with regard to Request for Admission No. 13 should be denied in its entirety.

Requests for Admission Nos. 15, 18, 21, 24 and 27

These Requests for Admission ask that The Community admit that in each specific year between 1992-1996 it "never notified, in writing or verbally, Registrant (or any affiliated corporation) of (its) claim to superior right in or prior use of the words 'Treasure Island' alone or with other words". *Every* possible definition of the term

"notified" is set forth in the correlating interrogatory response. In effect, TIC is complaining that The Community's response is over-inclusive. The Community is not in the position of defining the word "notified" so, given this fact, an indisputably comprehensive response, explaining the basis of the response to the Request for Admission is set forth in Interrogatory 6(g), attached to the McCue declaration submitted in connection with TIC's Motion as Exhibit B.

The Community's response to the proffered Request for Admission is completely proper. The Community has clarified, through its Interrogatory response, every possible scenario relevant to notification. Again, TIC's objection is based upon, ironically, a claim that The Community has set forth *too much* information. In fact, The Community has gone above and beyond what is required by the discovery rules by setting forth every possible scenario relevant to the "notice" issue. The Board should deny TIC's Motion as it concerns this Request.

Request for Admission No. 69

This Request for Admission states as follows:

> Admit that "The Mirage" is a famous resort hotel casino located in Las Vegas, Nevada.

Whether or not "The Mirage" is "famous" is unknown. "Famous" is not defined by the Request. Whether or not The Community considers The Mirage to be "famous" is unknown, for the simple reason that The Community has no evidence proving that The Mirage is "famous". TIC's Motion should be denied to the extent it concerns this Request.

Interrogatory No. 1

This Interrogatory reads as follows:

> State all of your actions with regard to the Treasure Island "TI" mark which may disprove any claim of undue delay, as stated in your response to Interrogatory No. 21 of Registrants Third Set of Interrogatories.

In response to this Interrogatory, The Community went into minute detail concerning the "actions" at issue in the Interrogatory. It is disingenuous for TIC to assert that The Community has not identified attorneys for Prairie Island personnel. TIC has taken the deposition of not only in house counsel from Prairie Island, but, as well, a lawyer from Merchant and Gould. The Community has, in addition, and irrespective of TIC's claims to the contrary, identified in the particular response, in previous document productions, in previous Interrogatory responses, in previous depositions, and in a produced privilege log the names of the attorneys and firms supposedly not disclosed.

Furthermore, The Community has produced documents pursuant to orders from this Board, as well as through general discovery materials identifying "those attorneys". Finally, the Interrogatory in no way, shape, or form requests that The Community "identify" attorneys.

For all the reasons stated above, TIC's Motion, as concerns this Interrogatory No. 1, must be denied in its entirety.

Interrogatory 5(b)

This Interrogatory states as follows:

> (b) if you contend that the use of the "Treasure Island" marks since 1989 by Registrants predecessor-in-interest, Golden Nugget, does not adhere to the benefit of Registrant, state all facts in the legal basis which support your contention.

Initially, TIC sent a Communication to The Community's attorneys asserting that the response to Interrogatory 5 was "nonresponsive because of merely asserts a legal conclusion without any factual basis as requested". See Exhibit C to Declaration of Michael J. McQue in support of Registrant's Motion (1) to Determine Sufficiency to Request for Admissions; (2) to Compel Supplementary responses to Interrogatories; and (3) for Production of Documents. In response, The Community specifically

indicated that it was "unsure which of the two sections of Interrogatory 5 is being referred to", but indicated that "in the spirit of cooperation, (it would) be willing to revisit this response if you would be kind enough to particularize what you believe is lacking". id, Exhibit D. TIC never clarified the issue. A follow-up communication dated August 16, 2002 (McQue declaration at Exhibit E) completely ignored the issue, and contains no discussion of this interrogatory. In any event, given the clarification contained in TIC's moving papers, which explains its position for the first time, this Interrogatory response [5(b)] will be amended.

Interrogatory Nos. 6(c)(f), and (g)

Interrogatory No. 6 states as follows:

> If you responded with a denial to any of the requests in Registrants First Set of Requests for Admission, identify all facts that form the basis of each denial.

While TIC apparently claims that Interrogatory No. 6(c) has not been responded to, nothing concerning this Interrogatory response is contained in its moving papers. TIC's Motion must be denied as concerns Interrogatory 6(c), and, this portion of this memorandum will discuss only responses 6(f) and (g).

With regard to Interrogatory No. 6(f), TIC contends that Prairie Island has not identified attorneys, nor who from Prairie Island gave "such direction". TIC has deposed attorneys from Merchant and Gould, and has received documents from Merchant and Gould as well as Dorsey & Whitney. The documents as well as the depositions fully set forth the information which is supposedly "lacking" in the response. None of this is to say that the response is in any way, shape, or form deficient. The response sets forth that in 1992 The Community first became aware that there was a casino facility under construction that was to be named Treasure Island. The response sets forth that the intellectual property law firm of Merchant and Gould was retained to advise The Community regarding intellectual property concerns. The response sets forth that a watching service was brought on board to monitor the Las Vegas concerns use of Treasure Island marks. The response sets forth that Merchant and Gould undertook a watching service to monitor the status of TIC's Federal Registrations. The response sets forth that in the 1992-1993 time period state registrations were obtained. Finally, the response sets forth, that, ultimately, petitions to cancel TIC's registrations were filed.

In effect, TIC is again complaining that too much information is being set forth in the response. In any event, TIC is fully aware of the identity the "attorneys" and "intellectual property counsel" as a result of document productions, interrogatories, depositions, and privilege logs. The response is full and fair, and TIC's Motion must be denied to the extent it concerns this response.

With regard to The Community's response to Interrogatory 6(g), as discussed above, the response is, apparently, too complete for TIC's purposes. The Community specifically sets forth in its response that, possibly as early as late 1992, attorneys for The Community were directed to contact TIC or its representatives regarding the Treasure Island project. TIC is fully apprised of the basis for this position, having taken the deposition of one Freeman Johnson who had knowledge of this fact. The latest possible date upon which TIC was informed in writing or verbally of The Communities superior rights was, as set forth in the response, October 28, 1998. All of the dates at issue in the Request for Admission discussed in the Interrogatory response, are covered by the comprehensive discussion contained therein. If, as stated by TIC, "the term 'notified' clearly does not mean constructive notice and specifically refers to written or verbal notice", then

that portion of the response which states as follows is directly applicable:

> Subject to and without waiving these objections, and interpreting the ambiguous Request to seek an admission regarding actions taken by the petitioner to communicate directly with the registrant regarding the petitioners rights in the mark TREASURE ISLAND, based on the record developed to date in this case, as early as late 1992, when the Tribal Counsel directed its attorneys to contact the registrant or its representatives regarding the Treasure Island Las Vegas project (see, deposition of Freeman Johnson), and no later than October 28, 1998 when the petitioner filed its first of seventeen (17) petitions to cancel federal service mark registrations improperly obtained by the registrant.

See pages 17-18 of TIC's Memorandum.

Response 6(g) is, again, apparently too comprehensive for TIC. The Community has taken every possible definition of "notified" and set forth proper, substantive, and honest information. TIC's Motion must be denied in connection with Interrogatory Response 6(g).

Interrogatory No. 9

This Interrogatory demands that The Community explain why its "casino services did not infringe the mark 'Treasure Island Hotel and Casino St. Martin,' for casino services". As discussed earlier in this memorandum, the proffered Interrogatory would require The Community to

hypothetically go back in time and assume that a full infringement analysis concerning a mark from the 1980's had been undertaken. In Abbott, et al. v. The United States of America, 177 F.R.D. at 92(N.D.N.Y. 1997) the plaintiff proffered a Request for Admission requiring the Defendant to assume hypothetical facts as part of a Request for Admission, and if that request was denied, to explain the factual and legal basis for the denial. Abbott, 177 F.R.D. at 93. There, the Court held as follows:

> The defect of this request is plain- -plaintiffs have attempted to have the Government respond to a legal question unconnected to the facts of the case at bar. . . .
> Although admittedly the boundary line is not always plain between permissible questions relating to the application of law to fact and objectionable questions relating to pure questions of law, the questions posed by plaintiffs in this case fall outside the bounds of proper discovery. Most telling is that plaintiffs have not posed proper questions requiring application of law to the facts peculiar to this case to clarify the government's legal theories; rather, plaintiffs have posed improper hypothetical factual scenarios unrelated to the facts here to ascertain answers to pure questions of law. This they cannot do. Abbott, id.

The instant situation is analogous to Abbott. TIC wishes to have The Community undertake an exercise in pure speculation and conjecture. Further, the question seeks a "pure legal conclusion which (is) related not to the facts, but to the law of the case". Williams v. Krieger 61 F.R.D.

142,144(S.D.N.Y. 1973) is proper. Again, it cannot be emphasized enough that what this Interrogatory seeks is a pure legal analysis based upon unknown and hypothetical facts concerning an obscure Caribbean concern which never lodged a claim of infringement against The Community, and which The Community knows very little about. No claim of infringement was ever lodged, and no business information concerning the St. Maarten concern was ever forwarded to TIC. Simply stated, TIC cannot reasonably respond to the Interrogatory and, under the law, it should not be so compelled to respond.

Documents Responsive to Document Request No. 1 of set 3

All documents responsive to this request have been served on TIC. In fact, in depositions which have occurred since TIC received the documents, the documents have been utilized. There is nothing left to be produced in connection with this document request, and therefor TIC's request should be denied in its entirety as it concerns this Request for Production of Documents.

III. CONCLUSION

For all of the above-stated reasons, TIC's Motion must be denied in its entirety.

Date: November 4, 2002

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Attorney for Petitioner
PRAIRIE ISLAND INDIAN COMMUNITY, A
FEDERALLY RECOGNIZED INDIAN TRIBE

ORIGINAL

ATTORNEY DOCKET NO. 1999-0254
Express Mail No. EL-835928398-US

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK
TRIAL AND APPEAL BOARD

Prairie Island Indian Community, a federally recognized Indian Tribe, Petitioner	Reg. Nos. 1,949,380; 1,955,279 2,010,396; 2,176,004; 1,984,421; 2,040,221; 2,019,481; 1,918,033 1,941,475; 1,966,090; 1,903,619 1,943,123; 1,949,379; 1,985,968; 2,040,756; 2,040,770; 1,981,369
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ASSISTANT COMMISSIONER FOR TRADEMARKS
2900 Crystal Drive
Box TTAB - NO FEE
Arlington, VA 22202-3513

CERTIFICATE OF MAILING VIA EXPRESS MAIL

Sir:

I hereby certify that the attached PETITIONERS MEMORANDUM IN RESPONSE TO REGISTRANT'S MOTION (1) TO DETERMINE THE SUFFICIENCY OF RESPONSES TO REQUEST FOR ADMISSIONS; (2) TO COMPEL SUPPLEMENTAL RESPONSES TO INTERROGATORIES; AND (3) FOR

PRODUCTION OF DOCUMENTS, CERTIFICATE OF SERVICE, and transmittal cover letter, in connection with the above-identified matter are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: BOX TTAB, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, under Express Mail Post Office to Addressee Label No. EL-835928398-US on November 4, 2002.

Respectfully submitted,

HAUGEN LAW FIRM PLLP

Date: 11/4/2002

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PRAIRIE ISLAND INDIAN COMMUNITY,
A FEDERALLY RECOGNIZED INDIAN TRIBE

{12587.DOC}

ORIGINAL

Attorney Docket No. 1999-0254
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Prairie Island Indian Community, a federally recognized Indian Tribe, Petitioner, vs. Treasure Island Corporation, Respondent.	Reg. Nos. 1,949,380; 1,955,279; 2,010,396; 2,176,004; 1,984,421; 2,040,221; 2,019,481; 1,918,033; 1,941,475; 1,966,090; 1,903,619; 1,943,123; 1,949,379; 1,985,968; 2,040,756; 2,040,770; 1,981,369 Can.Nos. 28,126; 28,127; 28,130; 28,133; 28,145; 28,155; 28,199; 28,248; 28,280; 28,294; 28,314; 28,319; 28,325; 28,342; 28,379; 28,171; 28,174

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing PETITIONERS MEMORANDUM IN RESPONSE TO REGISTRANT'S MOTION (1) TO DETERMINE THE SUFFICIENCY OF RESPONSES TO REQUEST FOR ADMISSIONS; (2) TO COMPEL SUPPLEMENTAL RESPONSES TO INTERROGATORIES; AND (3) FOR PRODUCTION OF DOCUMENTS was served on Treasure Island Corp., c/o Michael McCue, of Quirk & Tratos, 3773 Howard Hughes Parkway, Suite 500 North, Las Vegas, NV 89109, Attorney for Applicant, by first class mail, postage prepaid, on November 4, 2002.

Dated: November 4, 2002

Eric O. Haugen
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